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IN THE

Supreme Court of the United States

OCTOBER TERM A.D., 1966

NORMAN PETERS and JOHN G. PHILLIPS,

Petitioners,

vs.

GUST BOUNOUGIAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners pray that a writ of certiorari issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the instant cause.

OPINION BELOW

The opinion of the Court of Appeals is dated October 25, 1966. Petition for rehearing was denied December 9, 1966. The opinion, which is now reported in 369 F. 2d ....., is quoted in full in the appendix hereto.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

A district court under the power of its discretionary, inherent and ancillary jurisdiction undertook to adjudicate a dispute over fees between attorneys and client arising out of litigation which had been tried before it, and enjoined the client from a course of harassing conduct against the attorney and his associate in a state court action.

By reversing the judgment of the district the decision of the court of appeals, raises the question as the proper scope and reach of inherent and ancillary power to protect all parties to the litigation before it and to do full and complete justice in the cause.

STATEMENT

In 1957, a personal injury action, jurisdictioned on diversity, was begun in the United States District Court by the respondent against Republic Steel Company. The litigation arising out of this suit became very complex and complicated and involved an impleaded third party brought into the suit by the original defendant. Respondent recovered a verdict and judgment for $105,000.00, which on appeal was affirmed. (*Bounougias* v. *Republic Steel Corp.*, 277 F. 2d 726 (7 Cir. 1960).

In these proceedings respondent was represented by petitioner, Norman Peters, who was assisted by John G. Phillips, the other petitioner herein, as trial counsel. There was no privity of contract between respondent and Phillips.

Under the agreement as to fees, which was partly written and partly oral, Mr. Peters was entitled to one-third if the cause terminated at the trial court level and up to one-half in the event of appeal. Although the case was appealed, Mr. Peters, at the request of the respondent, modified his fee arrangement with respondent to a net 40 per cent. Respondent accepted distribution of the proceeds of the judgment without objection.

Four months after he received his money, respondent began an action in state court to set aside the fee arrangement under which distribution was made, claimed the fee should be only one-third without deductions for expenses, and charged both petitioners with fraud, misrepresentation and breach of fiduciary relation. The state circuit court entered summary judgment for petitioners. On appeal the state appellate court affirmed as to petitioner

Phillips but reversed as to Peters, and ordered a trial on the issues of fact created by the pleadings therein. (*Bounougias* v. *Peters,* 49 Ill. App. 2d 138 (1964).)

When the case was returned to the state circuit court, respondent refused to abide by the mandate of the state appellate court affirming the dismissal of Phillips from the litigation, and sought to redocket the case as to Phillips as well as to Peters. Though the petitioner Phillips was no longer in the case, respondent filed voluminous motions, pleadings, discovery actions against both petitioners, and overtly threatened to reimplicate petitioner Phillips in the state court litigation.

On November 9, 1964, petitioners filed the U. S. District Court and presented to the same district judge who heard the original diversity suit, an "Ancillary Petition to Affix Attorneys' Fees and for Injunctive Relief." The petition was based on the theory of the inherent power of the district court to do complete justice to all persons involved in the litigation conducted before it, and invoked jurisdiction of the court ancillary to the original jurisdiction of the court in *Bounougias* v. *Republic Steel.* The petitioner also invoked the power of the court to protect attorneys as officers of the federal court from a scurrilous attack on them by respondent in the state court action and to prevent respondent from reinvolving petitioner Phillips into the litigation. The petition however, did not pretend to preclude respondent from an opportunity to assert any rights he believed he had or to be heard thereon, but instead, prayed that the court do equity in regard to any claim that respondent had against the petitioners.

The district judge, after first issuing a temporary restraining order enjoining the state court action, dismissed the ancillary petition and dissolved this injunction, after

being assured by respondent's counsel that petitioner Phillips would not be renamed a party to the further state court litigation.

Promptly after the injunction was lifted, proceedings were resumed in the state court suit and respondent impleaded petitioner Phillips. An amended and supplemental complaint filed immediately in the state court action by respondent repeated all the allegations of the original complaint against both petitioners, changed the gist of $18,563.81 to $73,563.81, and sought punitive damages, the action to malice, increased the ad damnum from manifestly because petitioners had invoked the ancillary jurisdiction of the federal court.

Petitioner Phillips removed the state court action to the U. S. District Court and the matter was assigned to the same district judge who heard the original diversity suit. On respondent's motion to remand to the state court, petitioners conceded that there was no jurisdictional ground for removal, but in view of the onerous course adopted by respondent subsequent to the district judge's dismissal of the ancillary petition, the petitioners moved the district court to reconsider ancillary petition and to hear the merits of the dispute between respondent and petitioners as to fees and the matters that respondent's onerous course of conduct gave rise to.

Based on matters brought to the attention of the district court, the court now reversed itself as to its earlier ruling dismissing the ancillary petition, and motions by the respondent to remand the action back to the state court were denied. The district court first dismissed Phillips from the case. It then proceeded to a trial on the fee dispute between Peters and Bounougias. Mr. Peters testified in open court on all facts and circumstance per-

taining to the fee arrangements, and the distribution of the proceeds and payment to respondent. Respondent was given a full opportunity to be heard and have his rights determined by the district judge. Respondent chose, however, to forego the opportunity. The district court found that it had ancillary jurisdiction and entered judgment in favor of Peters on the merits of respondent's claim against him for money damages.

On respondent's appeal to the Seventh Circuit, the district court judgment was vacated "for lack of jurisdiction" and the cause remanded with instructions to remand it to the state court for further proceedings.

The rationale for the Court of Appeals' decision is that the district court lacked ancillary jurisdiction to hear the case, and that the district court did not have to settle the fee dispute as part of its jurisdiction over the principal litigation in the negligence suit. And contrary to the district court's decision, the court of appeals denied that the ancillary relief requested by petition "relates to matters coming so near to the life and dignity of the district court that an exercise of inherent powers to protect its authority was necessary." (App. 5).

THEORY OF PETITIONERS

Granted, a dispute might arise between attorney and client. But if a client, in order to enforce his alleged claim against an attorney, seeks to vex, abuse, annoy, threaten and coerce the attorney, not only with demands for his claim, but with charges of malice and seeking punitive damages the court in which parties and attorneys appeared should take notice. Such threats are inimical to the practice of law. No lawyer is immune from accounting

for his behavior and professional conduct to both client and court, but he should not become a target for chicanery.

It is submitted that when a lawyer is exposed to such malicious accusations he is entitled to have the court in which he acted in his professional capacity pass upon the charges and, if necessary, protect him through the proper exercise of its powers; and, further when malice is charged and punitive damages is sought merely for employing a court's process in good faith, the court must act to preserve its own dignity and integrity.

REASONS FOR GRANTING THE WRIT

1. Plaintiff filed in the state court action against defendants, an amended and supplemental complaint, all of which became part of a public record, adding a count VI containing 26 paragraphs, and a count VI containing 27 paragraphs. Besides duplicating counts I to V, of the original complaint, the amended and supplemental complaint not only violated common rules of pleadings in that they were beset with irrelevancies, redundancies, narratives, evidentiary matters and conclusions, but they included scandalous and defamatory matter.

That it was designed to abuse and harass petitioners is evident from its intemperate language and allegations. It alleged that Peters "inexorably and menacingly demanded renegotiations," that Phillips participated in the "illicit fruits", that, "they stand as trustees ex malificio to Bounougias," that they "wilfully, maliciously and vexatiously filed an action for declaratory judgment and injunctive relief in the United States District Court," and that it demanded, as damages $18,563.81, for moneys allegedly retained, $5,000.00 as attorneys' fees and $50,000.00 punitive damages with malice as the gist of the action!

2. The Court of Appeals' decision is premised on a singularly narrow conception of the ancillary jurisdiction of a federal court. The citation of *Fulton Bank* v. *Hozier*, 267 U.S. 276, 280 (1925), is correct insofar as ancillary jurisdiction is invoked on the res theory, where property and assets are the subject matter of the principal suit. This, however, is but *one* species of ancillary jurisdiction. It hardly exhausts the ambit of the federal court's power

(viz. *Wright, Federal Courts* 17, 1863, cited in the court's footnote p. 4; *Barron and Holtzman, Federal Practice and Procedure* Vol. 1-A, sec. 23 p. 93, 95.)

The notion that the district court had to still retain control over the *res* in order to settle, by way of ancillary jurisdiction, a dispute as to attorneys' fees is refuted in *American Federation of Tobacco Growers, Inc.* v. *Allen,* 186 F. 2d 590 (4th Cir. 1951), where the court expressively notes that an allegation of mistreatment of an attorney as an officer of the court is a proper subject for ancillary relief. Likewise, *Empire Linotype School* v. *United States,* 143 F. Sup. 627 (S.D.N.Y. 1956), is authority for the proposition that the court's duty and power to regulate the conduct of attorneys practicing before it, cannot be defeated by laches or delay in bringing the matter to the court's attention.

3. The Court of Appeal states:

> "These facts indicate that these proceedings do not relate to any matter which full justice, logic or even convenience would have required a decision upon by the trial court as part of the original litigation. . . . Nor can it be said that this suit relates to matters coming so near to the life and dignity of the district court that an exercise of inherent powers to protect its authority was necessary."

The statement of the court is an unwarranted abrogation of the power of a district court to exercise its inherent powers. Thus, it should be noted that the district judge was prompted to exercise ancillary jurisdiction by virtue of misconduct *committed in the presence of the court:* viz., the representation to the court by respondent's motion to dissolve the temporary injunction that Phillips would not be reimplicated in the state court litigation, and the prompt refiling of the action against Phillips within min-

utes after the ink was dry on the court's order, and by the intolerable conduct of the respondent in seeking punitive damages of $50,000.00 and $5,000.00 attorney's fees against petitioners, endeavoring to punish them, merely because they exercised their rights in seeking relief in the federal courts from the harassing tactics of the respondent.

Even if the district court did not have removal jurisdiction, its ancillary jurisdiction to settle the fee dispute arising out of the original negligence litigation remained intact. Moreover it never lost its inherent power to protect the dignity of the court and the reputation of its officers against misconduct and punishment sought to be inflicted upon the petitioners merely for using federal process.

The court of appeals acknowledged that a patent wrong had been done Phillips. The court implies it does not approve of the conduct pursued by respondent in reimplicating Phillips in the litigation. Yet it is willing to remain inert when a patent transgression is committed before its very eyes. These were the very reasons which impelled the district judge to exercise ancillary jurisdiction in order, as the court said in *Walmac Company, Inc.* v. *Isaacs,* 220 F. 2d 108, 113 (1st Cir. 1955), "to do full justice". The court of appeals perpetrates an anomaly in holding that the district court was powerless to redress an obvious wrong, particularly when it involves persons who are officers of the court and stems directly from a case originally lodged in the district court.

Contrary to the assumptions of the Court of Appeals, herein, what is involved is not a question of the *power* of the district court to act as it did, but a question of jurisdicial *policy* and *discretion.* Tacitly the court below seemed concerned that the district court's action was an unwar-

ranted interference with state court proceedings. But since the original litigation was first lodged in the district court by the respondent himself, he should have no cause to complain if the district court undertook to see all matters to final conclusions and the doctrine of *Brillhart* v. *Excess Insurance Co.*, 316 U.S. 491 (1941), and the class of cases which it exemplifies would not be a barrier to the district court's exercise of discretion.

The Court of Appeals loses sight of the fact that the judge of the district court was willing to afford respondent a full hearing, render substantial justice to the parties and terminate the protracted litigation on the merits. While the court of appeals points out that the numerous proceedings below is an inglorious example of "over-litigation," they were commenced against petitioners by respondents and that petitioners are involuntary participants therein: (2) that the instant decision will have an effect opposite of what the court clearly intends since the result is to protract, not terminate this modern version of *Jarndyce* v. *Jarndyce*: (3) that in reversing the lower court, the court of appeals is undoing the salutory decision of the district court to take matters in hand by giving all parties a quick, expeditious and impartial adjudication of the entire dispute.

5. Finally, the instant decision of the court of appeals does violence to the spirit and letter of Rule 61 of the Federal Rules of Civil Procedure, which provides:

> "No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court incon

sistent with substantial justice. The court at every stage of the proceedings must disregard any error or defect in the proceedings which does not effect the substantial rights to the parties."

Neither the respondent nor the court of appeals points out in any particular in which the respondent was prejudiced by the action of the district court in undertaking to do substantial justice to the parties, and hearing the fee disputes and the charges of misconduct against the petitioners as officers of the federal court.

CONCLUSION

Wherefore petitioner prays that a Writ of Certiorari issue to the Court of Appeals.

Respectfully submitted,

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